UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 83

Docket No. AT-0752-11-0814-I-1

Eric Rose,

Appellant,

v.

Department of Defense,

Agency.

July 12, 2012

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

Stacey Turner Caldwell, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed the appellant's alleged constructive suspension from June 11, through October 21, 2011. For the reasons discussed below, we GRANT the agency's petition for review, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant is a WG-4 Store Worker/Forklift Operator at the Department of Defense's Defense Commissary Agency (agency), which is a tenant activity of

the Department of the Navy's Gulfport, Mississippi Naval Construction Battalion Center (NCBC). Initial Appeal File (IAF), Tab 4; Tab 14, Stipulation of Facts at 4 of 6. On June 10, 2011, NCBC Acting Commanding Officer Knudsen issued a notice, effective upon receipt, barring the appellant from entering the NCBC for "1) carrying a concealed weapon; and 2) threats of violence against persons inside the commissary." IAF, Tab 9 at 8; Tab 14, Stipulation of Facts at 4 of 6. The notice informed the appellant that, if he entered, or was found in or around the NCBC, he would be in violation of the order and 18 U.S.C. § 1382, and "may be subject to a fine of not more than $500.00 or imprisoned not more than six months or both." IAF, Tab 9 at 8. On June 11, 2011, the agency began carrying the appellant in an absence without leave (AWOL) status because of his failure to report for work. IAF, Tab 14, Stipulation of Facts at 4 of 6.

¶3 On July 1, 2011, the appellant filed an appeal alleging that the agency had constructively suspended him for more than 14 days. IAF, Tab 1; *see also* IAF, Tab 4. The agency moved to dismiss the appeal for lack of jurisdiction.[1] IAF, Tab 9. After the appellant waived his right to a hearing, IAF, Tab 15 at 2, the administrative judge issued a decision on the written record, IAF, Tab 18.

¶4 The administrative judge found that the Board addressed the situation presented here—an employee being barred by one governmental entity from being able to report for duty to another governmental entity—in *Hollingsworth v. Defense Commissary Agency*, 82 M.S.P.R. 444 (1999). Initial Decision (ID) at 3. He found that the Board there required an employee to prove the following four

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[1] Effective October 21, 2011, the agency removed the appellant based on charges of absence from duty due to barment and AWOL. IAF, Tab 14, Stipulation of Facts at 4-5 of 6. The administrative judge subsequently reversed the removal. *Rose v. Department of Defense*, MSPB Docket No. AT-0752-12-0063-I-1, Initial Decision (Apr. 20, 2012). The agency has filed a petition for review of that initial decision, and the appellant has filed a motion to join that case with this one. We DENY the motion because joinder will not expedite the processing of the cases. 5 C.F.R. § 1201.36(b)(1).

factors to prove that he was constructively suspended:[2] (1) He was absent because of circumstances beyond his control; (2) he informed the agency that, but for those circumstances, he was ready, willing, and able to work; (3) the agency was bound by agency policy, rule, regulation, contractual provision, or other authority to offer assistance to the employee with the circumstances beyond his control; and (4) the agency failed to offer such assistance. ID at 3.

¶5 The administrative judge found that the appellant proved Board jurisdiction under the first two *Hollingsworth* factors. ID at 3-4. The administrative judge found that the second two *Hollingsworth* factors should not be applied to this appeal. ID at 5-6. He thus concluded that the appellant proved that he was constructively suspended, and he reversed the agency's action. ID at 6.

¶6 The agency has filed a petition for review. Petition for Review (PFR) File, Tab 1. The appellant has filed a response opposing the petition for review.[3] PFR File, Tab 4.

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[2] The administrative judge correctly found that the appellant must prove these elements to establish jurisdiction because he waived his right to a hearing. ID at 3; *cf. Hollingsworth*, 82 M.S.P.R. 444, ¶¶ 7-12 (remanding the appeal for a jurisdictional hearing and any necessary further proceedings because the appellant made a nonfrivolous allegation satisfying the jurisdictional test).

[3] The agency has moved to strike documents the appellant submitted for the first time with his response and his arguments based on those documents. PFR File, Tab 3. We GRANT the agency's motion. First, the Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review. 5 C.F.R. § 1201.114(b). Second, the appellant has not shown that the documents were previously unavailable despite his due diligence before the record closed below; rather, he simply asserts that they were "received" in response to his subsequent removal and that they help "flesh out" the facts of this case. PFR File, Tab 4, Appellant's Resp. at 2 n.1. Thus, the Board will not consider the documents or the arguments based upon them. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).

ANALYSIS

The administrative judge should have applied the test set forth in *Hollingsworth*, 82 M.S.P.R. 444, in adjudicating this appeal.

¶7 The agency argues that the administrative judge should have applied all four factors set forth in *Hollingsworth* in adjudicating this appeal. PFR File, Tab 1 at 19-26. The administrative judge declined to apply factors three and four, stating his view that "this aspect of the test unduly burdens the appellant and fails to give appropriate credence to the employer-employee relationship," and "ostensibly permits a tenant activity to have unfettered disciplinary authority, not subject to review," which is "against public policy." ID at 5. He also found that the agency is aware of the process for requesting a restrictive bar from the Commanding Officer that would allow an employee access to work and "has ready access to information about approvals and disapprovals of requests for restrictive bars." ID at 6. Thus, he stated his view that the agency, not the appellant, should have the burden of coming forward with such information. *Id.* He reiterated that "parts 3 and 4 of the *Hollingsworth* test fail to give proper credence and weight to the employer-employee relationship and yield results contrary to public policy." *Id.*

¶8 We agree with the agency that the administrative judge should have applied all four factors. *Hollingsworth* is a precedential Board decision. The administrative judge acknowledged that it addressed the situation presented in this case, ID at 3, but simply declined to apply it. An administrative judge is bound by Board precedent and is not free to substitute his views for Board law. *Cf. Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 10 n.9 (2012) (noting that the Board is bound to follow its reviewing court's precedent).

Under the *Hollingsworth* test, the appellant did not establish that the agency constructively suspended him.

¶9 The agency argues that the record does not support the administrative judge's findings concerning the first two *Hollingsworth* factors, i.e., that the

appellant was absent due to circumstances beyond his control and that he was ready, willing, and able to work. PFR File, Tab 1 at 17-19. The administrative judge found that it was entirely Knudsen's act of barring the appellant that caused his absence and that it was a matter beyond his control. The administrative judge concluded that the appellant proved the Board's jurisdiction over the appeal under the first and second *Hollingsworth* factors. ID at 4.

¶10 We find it unnecessary to determine whether the appellant proved that his absence was for a matter beyond his control because he did not show that he was ready, willing, and able to work, and, thus, did not satisfy the second *Hollingsworth* factor. The administrative judge did not cite any specific basis for finding that the appellant proved the second *Hollingsworth* factor. ID at 4. Further, although the appellant's attorney stated that the agency had denied the appellant's "request" to return to work, IAF, Tab 1 at 2, a representative's statements in a pleading are not evidence, *see, e.g.*, *Santos v. U.S. Postal Service*, 77 M.S.P.R. 573, 577 (1998). In his sworn statement, the appellant did not aver that he asked to return to work, IAF, Tab 4, and the record contains no evidence establishing that he did so. Indeed, Knudsen's June 10, 2011 order instructed the appellant to submit a request to modify or terminate the order if he believed that any compelling reason existed that he believed would be sufficient. IAF, Tab 4, Tab 9 at 8. The appellant has presented no evidence showing that he contacted either Knudsen or the agency. Rather, the record shows only that he filed a Board appeal on July 1, 2011. IAF, Tab 1. Therefore, even applying only the second factor, the appellant cannot prevail.

¶11 The agency argues that the administrative judge failed to distinguish this case from *Hollingsworth* in declining to apply factors three and four. PFR File, Tab 1 at 19-24, 27. The administrative judge found that every military department has a regulation that governs bars to the installation and provides for requesting a restricted bar with limited access, such as transit directly to and from the workplace. He cited the Department of the Navy's regulation as containing a

sample bar letter with the following language: "If you believe any compelling reason exists sufficient to justify modification or termination of this order, you may submit a request for consideration to my Staff Judge Advocate, at the above address." ID at 5 n.4. He found that "[h]ere, there is no indication that the agency informed the appellant he could make a request for a restrictive bar or made a request on his behalf." ID at 5. As previously noted, the administrative judge found that the agency is aware of the process of requesting a restrictive bar, and the agency has ready access to information about approvals and disapprovals of requests for such bars. ID at 6.

¶12 To the extent that the administrative judge did not apply factors three and four of *Hollingsworth* because he found the *Hollingsworth* factors "against public policy," we agree with the agency that his finding was incorrect. As explained above, Knudsen's June 10, 2011 order contained language similar to the sample letter that the administrative judge cited, which notified the appellant that he could request termination or modification of the bar. IAF, Tab 4, Tab 9 at 8. Further, in *Hollingsworth*, the Board simply found that, as a tenant agency of the Department of the Army, the agency performed certain functions in cooperation with the Department of the Army through agreements, and the fact that the agency was separate from the Department of the Army was not dispositive of whether the agency had constructively suspended the appellant. *Hollingsworth*, 82 M.S.P.R. 444, ¶ 10. Rather, the Board found that the dispositive issue was whether the agency had a policy, rule, contractual provision, or regulation that obligated its cooperation with the Department of the Army to seek a limited bar for the appellant. *Id.* It found that the appellant had made a nonfrivolous allegation entitling him to a jurisdictional hearing in that regard. *Id.*, ¶ 11.

¶13 Neither the appellant nor the administrative judge cited any evidence establishing that the appellant asked the agency to help him seek a limited bar, that the agency was required to help him, and that it refused to do so. Thus, the

appellant did not show that he established factors three and four of the *Hollingsworth* test.

The Board lacks jurisdiction over the appeal.

¶14 The agency argues that the administrative judge erred to the extent that he found that it had taken any disciplinary action against the appellant related to the barment because its carrying of the appellant on AWOL status was not itself an appealable action. As the agency asserts, its decision to place the appellant in an AWOL status is not itself an action appealable to the Board. *See, e.g.*, *Bucci v. Department of Education*, 36 M.S.P.R. 489, 491 (1988). For the reasons discussed above, we find that the appellant has failed to show that his absence was a constructive suspension appealable to the Board. Thus, we vacate the initial decision and dismiss the appeal for lack of jurisdiction.

ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.